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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 52 52

INGRAM M. STAINBACK, GOVERNOR OF THE TERRITORY OF HAWAII; WALTER D. ACKERMAN, JR., ATTORNEY GENERAL OF THE TERRITORY OF HAWAII, AND W. H. LOPER, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF HAWAII, *Appellants,*

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION; DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, ET AL., *Appellees*

REPLY BRIEF FOR APPELLANTS

THOMAS W. FLYNN,
Deputy Attorney General of Hawaii,
Attorney for Appellants.

WALTER D. ACKERMAN, JR.,
Attorney General of Hawaii;
RHODA V. LEWIS,
Asst. Attorney General of Hawaii;
PAULINE DAY BAKST,
Deputy Attorney General of Hawaii;
ROBERT B. GRIFFITH,
Deputy Attorney General of Hawaii;
C. NILS TAVARES,
Honolulu, T. H.,
Of Counsel.

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REPLY BRIEF FOR APPELLANTS

Introductory Statement

This brief is being submitted in accordance with the order made by the Court during the oral argument, allowing one week's time for the filing hereof. This brief is not intended as a comprehensive answer to the arguments set forth in the briefs of Appellees and the several friends of the Court, but will be limited to a "high-lighting" of those points as to which we believe clarification may serve some useful purpose. This brief will likewise restate the position of the

Attorney General of Hawaii that the statute does not apply to a parent who instructs his children in the home in a foreign language, and that religious instruction, where a foreign language is used, is not within the statute, and no action to enjoin any such practice could or would be brought.

Appellants respectfully submit to the Court that the extensive arguments in the several briefs of Appellees and Amici have already been adequately treated and answered in our opening brief.

The Argument

I. The Claim of "Racism" in the Statute Is Groundless

It is well-known that the racial harmony existing in Hawaii is without equal elsewhere. Hawaii is a community which has always taken justifiable pride in its freedom from the evil of race prejudice. A committee of the Congress, after a thorough Territory-wide investigation concluded: "Its different racial groups live together with a minimum of friction and no racial clashes * * *" (H. R. Rep. No. 1620, 79th Cong. 2d Sess., report of subcommittee of the Committee on the Territories, Finding No. 10, being Appendix 4 of H. R. Rep. No. 194, 80th Cong. 1st Sess., referring to the subcommittee report at p. 11.)

The statute itself plainly applies to all persons coming within its reasonably regulatory provisions, without regard to race or color. The problem involved in the handicap placed upon children by bilingual studies at too early an age, was shown to be accentuated when the second of the two languages is an oriental language. Such a finding or observation by the Legislature simply can not constitute "racial hostility" in any sense of that term.

II. The Cases * Principally Relied upon by Appellees do Not Apply

It is submitted that this proposition has been adequately treated in Appellants' Opening Brief, pages 70-72, and it will not be restated herein. Appellants do, however, wish to call again to the attention of the Court, the plainly distinguishable objectives and regulations of the earlier statutes and the one involved in the present case. This is particularly true in considering the statute involved in the *Farrington* case, which was essentially a program of censorship of the content of what was taught in the language schools, together with extensive regulations designed to carry out such censorship. The *Farrington* case simply did not present any issue as to the authority of the Territory reasonably to defer the undertaking of intensive bilingual language studies so as to protect the very young children from the handicaps thereby imposed.

III. The Severability of the Statutory Regulations Is Clear

Upon the question of severability, the decisions in *Thornhill* v. *Alabama*, 310 U. S. 88, and *Thomas* v. *Collins*, 323 U. S. 516 (Appellees' Brief, p. 42), merely hold that the conviction of a defendant in a criminal case cannot be sustained where an invalid part of the statute has been used against him even though he possibly could have been tried and convicted under some other part of the statute, not invalid. See *Cole* v. *Arkansas*, 333 U. S. 196.

Appellants respectfully submit, or resubmit, that each of the requirements of the statute is separable from the others, and should be so regarded in consideration of this

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* *Farrington* v. *Tokushige*, 273 U. S. 284;
Meyer v. *Nebraska*, 262 U. S. 390;
Pierce v. *Society of Sisters*, 268 U. S. 510;
West Va. State Bd. of Education v. *Barnette*, 319 U. S. 624.

case. Thus this Court could find that the necessity of the requirement, that the teacher of Chinese pass an examination in English, is not supported by any evidence, but such finding plainly could have no relation to the requirement of deferral of bilingual studies for the reasonably short period of four years.

IV. The Doctrine of Deference Is Applicable

Beginning at p. 43, Appellees' Brief exemplifies the need for application of the deference rule. Whether or not the statute is unconstitutional for failure of the Legislature to adopt measures reasonably directed to the evil to be met could only be determined after the statute was interpreted by the Territorial Courts. We submit that our interpretation of the statute establishes it as reasonable (Appellants' Opening Brief, pp. 92-94). Arguments that it was inconsistent for the Legislature not to apply the statute to one child taught alone (Paragraph "Third," p. 44 of Appellees' Brief), and that there may be some children, not bilingual, as to whom the arguments in support of the legislation do not apply to the same great degree as those arguments apply to others, such as the parties in this case—such arguments are typical of instances where those who feel themselves to be the ones against whom a statute is chiefly directed have attacked it because of its effect in extremely minor instances which it would be or may be impracticable to bring within the scope of the statute, or impracticable to except from its scope. This Court has frequently stated that a statute cannot be invalidated by this species of attack. See: *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639, writ of error dismissed, 242 U. S. 618; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Fairmont Co.* v. *Minnesota*, 274 U. S. 1, 11.

The application of the doctrine of deference in this case was indicated in our opening brief, Point IV. The doctrine does not apply to the primary issue as to whether it is competent for the Legislature to reasonably defer bilingual instruction. The doctrine does apply to the question whether the terms of the statute as it has been framed are reasonably directed to meet the evil found by the Legislature. Appellees do not confine their attack upon the statute to the primary issue above stated. In seeking to place upon the statute interpretations which would invalidate it, when reasonable interpretations which might readily be placed upon it in the Territorial courts would show that the statute is reasonably directed to meet the evil found by the Legislature, Appellees' arguments demonstrate the need for applying the doctrine of deference. The reason why Appellants had been prevented from proceeding in the Territorial Court and staying the litigation in the Federal Court, under the terms of Sec. 266 of the Judicial Code, have been stated in footnote 36, page 48 of our opening brief.

As to the doctrine of deference, Appellees chiefly rely on *King* v. *United Commercial Travelers*, 333 U. S. 153; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Meredith* v. *County of Winterhaven*, 320 U. S. 228; and *Markham* v. *Allen*, 326 U. S. 490 (Appellees' Brief, p. 67). These cases do not involve the doctrine of abstention, of which the doctrine of deference is a part. None of these cases involves an attack on a state statute under the Constitution of the United States. The rule that a Federal court will not, under the Constitution of the United States, invalidate a state statute when the interpretation of the local law may be such as to eliminate the particular constitutional issue, is the rule of *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, and it is on this case and the line of cases stemming from it that we rely.

V. Allegations That the Statute Is "Too Broad and Sweeping" Are Insupportable

The contention made by Appellees in their Brief, pages 30-32, simply misses the point that the Hawaiian statute is appropriate to its own objective, which is different from the objectives of the earlier statutes. That the statutory definition of the term "school" is broad enough to include private tutoring is consistent with the purpose of the statute, which is the deferral of bilingual instruction of very young children. This was not the objective in the *Meyer* case, and the fact that the statute there involved applied only to the regular schools and only to modern languages, was the very reason why the Court said that the statute had nothing to do with the protection of the child's health by limiting his mental activities (262 U. S. at p. 403).

VI. The Great Freedoms of the First Amendment Are Not Involved in This Case, Nor Is the Exercise of Them Interfered With by the Statute

Appellants respectfully remind the Court that the statute was challenged only under the Fifth Amendment. Appellants further state that the great freedoms of religion and speech are not interfered with by the provisions of the statute or by the intended application of the provisions. And Appellants likewise submit that even if there should be any suggestion or feeling that rights protected by the First Amendment are or may possibly become involved (with which we earnestly disagree), then the decision of the Court in *Prince* v. *Massachusetts*, 321 U. S. 158, is clearly applicable here and the clear and present danger rule does not apply.

Appellants have heretofore taken, and do hereby restate, their position that the teaching of religious matter, in which

a foreign language is used, and the teaching of a foreign language by a parent to his children in the home, are not within the contemplation of the statute. The Attorney General of Hawaii heretofore stated, and does hereby state, that no action or proceeding will be brought to enjoin any person from teaching religious matter to children, in which teaching a foreign language is used, nor to enjoin any parent from teaching a foreign language to his children in the home, nor to enjoin any person from using a foreign language at any time.

Conclusion

The decree of the lower court should be reversed and the action dismissed.

Dated at Washington, D. C., this 17th day of January, 1949.

Respectfully submitted,

THOMAS W. FLYNN,
Deputy Attorney General of Hawaii,
Attorney for Appellants.

WALTER D. ACKERMAN, JR.,
Attorney General of Hawaii;
RHODA V. LEWIS,
Asst. Attorney General of Hawaii;
PAULINE DAY BARST,
Deputy Attorney General of Hawaii;
ROBERT B. GRIFFITH,
Deputy Attorney General of Hawaii;
C. NILS TAVARES,
Honolulu, T. H.,
Of Counsel.